over to the Government whatever records CNB were to give him and the mere turnover will surely not authenticate them." App. 8a. "Stated somewhat differently, for Gippetti to produce the records would have no testimonial significance and any Fifth Amendment claim would be without merit." App. 8a.

Gippetti timely petitioned for panel rehearing and for *en banc* review by the entire Third Circuit. Gippetti's petition was denied on January 4, 2006. App. 13a-14a.

ARGUMENT

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision violates Gippetti's Fifth Amendment right not to be a witness against himself in two interrelated ways. First, it compels him to make a testimonial communication to obtain foreign bank records for the Government that are otherwise unavailable to it without any protection against the Government's use of the fruits of that compelled communication. Secondly, Gippetti's Fifth Amendment rights are violated by requiring him to prove affirmatively that he does not possess or control the records in order to avoid being compelled to make the testimonial communication.

A. Compelling the Target of a Tax Investigation to Obtain and Produce Records of an Offshore Bank Not Otherwise Available to the Government is a Testimonial Act of Production

The Third Circuit found that compelling Gippetti to produce the CNB records "by whatever means" is not "testimonial" because the Government already knows the records sought exist, knows that CNB has possession of

them and that CNB could authenticate them if Gippetti produces them. The Third Circuit's reasoning is contrary to this Court's decisions in *Fisher*, *Doe II* and *United States v. Hubbell*, 530 U.S. 27 (2000) and erroneously focuses only on the end result of the compulsion being exerted on Gippetti, *i.e.*, the act of turning over the records he has been compelled to communicate with CNB to obtain and ignores the obvious compelled communication he would have to make with CNB to persuade it to release the records CNB has *in its possession* to Gippetti so that he can avoid being cited for contempt. It further ignores the reality that CNB has already refused to cooperate and that the Government cannot compel its cooperation because it has no jurisdiction over an offshore bank like CNB. *Cf. United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (Miami branch of Canadian bank held in contempt for failing to comply with grand jury subpoena for records of transactions by U.S. taxpayers in its Cayman Islands and Bahamas branches notwithstanding foreign bank secrecy laws and principles of international comity).

Fisher held that while the contents of voluntarily created records are not protected by the Fifth Amendment privilege against self-incrimination, a taxpayer's "act of production" of such "voluntarily created" records may have testimonial aspects. *Fisher*, 425 U.S. at 410.

To resolve the latter question, the *Fisher* Court found it necessary to determine whether the witness was communicating any information in addition to producing unprivileged documents by his "act of production." It found that the witness was implicitly communicating that the documents exist, that the documents produced are believed to be what is called for, the production is complete and the documents are what they purport to be

(they are authentic). The Court then sought to determine whether any of these implicit factual communications provided the Government with information it did not already have or know. If not, the act of production was not "testimony" – it was the mere surrender of documents.

The Court found that there was nothing "testimonial" about requiring Fisher to produce his accountant's files because their ultimate production to and authentication by the Government was "a foregone conclusion" since (a) the Government already knew the files existed, (b) Fisher's attorneys had admitted they had them, and (c) since the accountants were the ones who created the files, only they could authenticate them. *Fisher* 425 U.S. at 411.

The Third Circuit cites *Fisher* and reasons that Gippetti's situation is the same because (a) the *Government knows* from reviewing CNB's website that *CNB typically issues account statements* and other types of records sought in the Summons *for bank accounts and credit cards* its customers maintain at CNB (*i.e.* the records sought exist), (b) *CNB has them* (*i.e.* CNB surely possesses copies of whatever records Gippetti lacks and could give him copies), and (c) if *Gippetti* were to produce the CNB records, he *would not be authenticating them because he did not create them* (*i.e.* once the records are produced, the Government will have to find a source to authenticate them in order to use them). App. 8a.

The Third Circuit's Opinion thus erroneously conflates CNB's undisputed possession of its records with Gippetti's and ignores the testimonial communications Gippetti is being required to make to CNB to convince CNB to give him the records, contrary to its already stated reservations about doing so under the circumstances. In short, unlike *Fisher*, the Government requires Gippetti's "truth telling" in order to get CNB to

release the records to him for ultimate delivery by him to the Government. This error is compounded by the Third Circuit's further conclusion that the Government's present inability to authenticate the records without Gippetti's act of production does not make the act "testimonial." [3]

B. Any Direct or Indirect Use of the Fruits of Gippetti's Compelled "Act of Production" Implicates the Fifth Amendment Contrary to *Kastigar v. United States*, 406 U.S. 441 (1972)

In compelling Gippetti to produce the CNB records "by whatever means" the Third Circuit has gone far beyond what this Court has found to be "non-testimonial" in *Doe II* and *Hubbell* and, in fact, requires Gippetti to be a witness against himself contrary to the Fifth Amendment but without the protection of either statutory or "act of production" immunity.

As in *Hubbell*, "it is apparent from the text of the [Summons] that the prosecutor [needs Gippetti's]

---

[3] The *Fisher* court's "foregone conclusion" test resembles the "inevitable discovery" doctrine found in *Nix v. Williams*, 467 U.S. 431 (1984). Although the two concepts are functionally similar, there are important distinctions. "Inevitable discovery" is a hypothetical concept based on the existing progress and direction of the Government's investigation but, as later noted in *Hubbell*, "non-testimonial" use of a compelled "act of production" requires an *actual* independent source. It is not enough to imagine that the documents were found abandoned in the grand jury room and could somehow be linked to the target independently. Moreover, in this case, even under the "inevitable discovery" test, there is no underlying basis for believing that, given the Cayman Islands Bank secrecy laws, the CNB records would ever have hypothetically been discovered. That is precisely why compelling Gippetti to obtain and produce them is testimonial.

assistance both to identify potential sources of information and to produce those sources." *Hubbell*, 530 U.S. at 41. Stated differently, the Government needs Gippetti to make some substantive, volitional communication with CNB to obtain the records so that he can deliver them to the Government; that is the essence of providing "testimony" and being a witness against one's self.

Where this Court has approved compelling a person to perform an act of production which has testimonial aspects, it has limited the use of the fruits of the compelled production by the Government in any subsequent criminal prosecution of the witness who made the production because the compelled production of documents or things by someone who may be criminally implicated by the thing or things produced is compelled testimony which, under *Kastigar v. United States*, 406 U.S. 441 (1979), the Government may not directly or indirectly criminally use against the producer.

Thus, in *Braswell v. United States*, 487 U.S. 99 (1988) this Court expressly recognized that a shareholder's "act of production" of corporate records has "testimonial" aspects and, in order to afford the target the full degree of protection afforded by the Fifth Amendment, held that the Government could not identify the individual who produced the records for the corporation. *Braswell,* 487 U.S. at 117; *see also Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 562 (1990) ("In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled.").

In reliance on *Doe II* and on the "act of production" protection offered by *Braswell* for compelled production of

another entity's records, Gippetti attempted to comply with the District Court's order by sending a modified form of "compelled consent" to it.[4]

In *Doe II*, this Court analyzed the Fifth Amendment implications of the "act of production" in the context of foreign bank records in a case very similar to Gippetti's.

This Court found no Fifth Amendment rights of Doe were implicated by requiring him to sign a consent directive which truthfully notified such recipients as the Government chose, that, under Court Order, Doe was deemed to have "consented" to the disclosure to the Government of any account information the recipient bank believed to be Doe's. *Doe II*, 487 U.S. at 207.

In order for a communication to be "testimonial," the Court reasoned that it "must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe II*, 487 U.S. at 213.

The Court distinguished situations in which an accused is compelled to submit voice or blood samples or perform physical tasks as not involving compelled "testimony" because, in those cases "the suspect was not required to disclose any knowledge he might have . . . to speak his guilt [or] . . . to disclose the contents of his own mind," and, instead, was only compelled to display physical characteristics. *Doe II*, 487 U.S. at 211.

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[4] The Third Circuit opinion goes beyond the District Court's order in that, besides compelling Gippetti to obtain and produce the CNB records for the Government, it expressly deems that production "non-testimonial," and thus denies him any protection against the Government using not only the fruits of his compelled act, but (logically) the act itself.

The consent directive at issue in *Doe II* was not to be a testimonial communication because it was phrased in the hypothetical, did not identify a particular bank or account nor acknowledge the existence of anything. Moreover, "because the directive explicitly indicates that it was signed pursuant to a Court Order, Doe's compelled execution of the form sheds no light on his actual intent or state of mind." *Doe II*, 487 U.S. at 216. Because Doe neither told the banks to produce records, nor acknowledged having any foreign accounts, any "act of production" was that of the banks and not testimony by Doe.

The Third Circuit concluded that requiring Gippetti to go further and actually obtain and produce the CNB records for the Government by "whatever means" is similarly "non-testimonial" because only CNB – not Gippetti – could authenticate whatever records Gippetti produces. This reasoning ignores the fact that CNB cannot be forced by the Government to produce its records directly to the Government and has already rejected a non-testimonial "consent directive" from Gippetti. Requiring Gippetti to do more (and use "whatever means") to ultimately obtain the records from CNB *and* deliver them to the Government necessarily requires him to make a "testimonial communication" to CNB in order to convince it to comply. The reality is that the Government typically cannot obtain such foreign bank records directly and needs the target to do it for the Government. *Cf. Doe II*, *Bank of Nova Scotia*, and *United States v. Payner*, 447 U.S. 727 (1980).

The Third Circuit's conclusion that compelling Gippetti to obtain them for the government is not "testimonial" is simply another formulation of the "manna from heaven" argument made by the Independent Counsel and rejected by this Court in *United States v. Hubbell*, 530 U.S. 27, 43 (2000). In *Hubbell*, the

Independent Counsel unsuccessfully sought to separate Hubbell's act of production from the fruits thereof and claimed that there was no Fifth Amendment prohibition against using leads from what Hubbell produced as long as the act itself was not mentioned and none of the actual documents were offered in evidence.

The Court found such an interpretation of the Fifth Amendment "anemic."

> We cannot accept the Government's submission that respondent's immunity did not preclude its derivative use of the produced documents because its possession of the documents [was] the fruit of a single physical act – the act of producing the documents. It was unquestionably necessary for respondent to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena . . . The assembly of those documents was like telling an inquisitor the combination to a wall safe not like being forced to surrender a key to a strongbox.
>
> *The Government's anemic view of respondent's act of production as a mere physical act that is principally non-testimonial and can be entirely divorced from its 'implicit' testimonial aspects* so as to constitute a 'legitimate' wholly independent source (as required by *Kastigar*) for the documents produced *simply fails to account for these realities*."

Hubbell, 530 U.S. at 43 (emphasis added and internal citations omitted).

That the Government can later somehow authenticate what Gippetti was compelled to give it does not make the act of obtaining it any less "testimonial."

Indeed, had Gippetti been granted statutory immunity under 18 U.S.C. § 6002 *et. seq.* and then obtained the records from CNB and delivered them to the Government, subsequent authentication of the records by CNB or another possible third party and their introduction into evidence would clearly be a prohibited derivative use of Gippetti's immunized and compelled testimony.

Like the Independent Counsel's argument in *Hubbell*, the Third Circuit's Opinion ignores the reality that a production will not occur at all (and thus could never yield fruits for so-called "independent" use) if Gippetti does not use his mind (under threat of contempt) to convince CNB to release the records to him for delivery to the Government. CNB is not an agent of Gippetti like the lawyer was in *Fisher*, but rather is an independent third party. That it may be more likely to take direction from Gippetti and not the Government makes all the more clear that compelling Gippetti to cause CNB to give him the records causes him to make a testimonial communication to CNB in order to accomplish what the Summons compels him to do. Doing so will result in the delivery to the Government of evidence it would not otherwise have been able to obtain. That evidence may, if the Government can later find a way to authenticate it or use leads from it, form a link in the chain of evidence which may ultimately result in Gippetti being prosecuted for a tax crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

C. Placing the Burden of Proving Lack of Possession, Custody or Control with Respect to the CNB Records On Gippetti Effectively Forces Him to Waive His Fifth Amendment Rights in Order to Vindicate Them

In this and other OCCP cases, the Government has aggressively maintained that taxpayers subject to audit have no Fifth Amendment right to refuse to produce their foreign account records for examination. [5]

Because the Third Circuit has adopted the IRS' position, a taxpayer like Gippetti thus is faced with four possible scenarios and, in all four, the same inevitable outcome – a choice between giving the Government what it wants even though doing so will likely cause his criminal prosecution for tax evasion or standing silent and going to jail for contempt.

First, he can voluntarily produce the records and testify thereby waiving any protection otherwise available to him under the Fifth Amendment. The IRS is then free to use the evidence thus obtained against him in a subsequent prosecution for tax evasion. Alternatively, he can acknowledge possessing the foreign account records sought but refuse to testify or produce them by asserting what he might reasonably believe to be his rights under the Fifth Amendment. Faced with enforcement proceedings, the taxpayer will later learn (much to his dismay) that his acknowledgment of possession has, under *Fisher* and *Hubbell*, enabled the Government to show that the existence, location and the

---

[5] *United States v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005); *United States v. Hall*, 2003 WL 23241703 (M.D. Fla. 2003) and *United States v. Plath*, 2003 WL 23138778 (S.D. Fla. 2003).

taxpayer's possession of the records were a "foregone conclusion" rendering his act of producing the records non-testimonial.

Conversely, if the taxpayer said nothing but ignored the enforcement proceedings, the entry of the order enforcing the Summons, once final, will preclude him from later arguing that he either did not have the records or that their production would violate his Fifth Amendment rights. This is because, at his contempt hearing, the only issue is whether he had complied with the order (and produced the records) or is able to affirmatively demonstrate his present inability to comply. To do the latter, he would have to waive his Fifth Amendment claim and testify subject to cross-examination to why he does not have the records, where they are, who does have them and a myriad of other potentially far more incriminating matters or go to jail until he produces the records. *See United States v. Rylander*, 460 U.S. 752 (1983).

Finally, the taxpayer may timely deny possessing the responsive foreign records on the date the Summons is issued to him or stand silent and refuse to say whether or not he possesses any responsive records on the basis of the Fifth Amendment consistent with this Court's holding in *United States v. Curcio*, 354 U.S. 118 (1957).

If the taxpayer has the burden of proving lack of possession, he will be in exactly the same position at the enforcement hearing as if he had ignored the enforcement proceedings and was defending against being held in contempt. To carry his burden he must waive his Fifth Amendment rights and testify to his lack of possession and, on cross-examination, explain why he does not have the records or who does. Should the taxpayer decline to be cross-examined, his direct testimony may be stricken or the District Court would be able to draw an adverse inference from his invocation of the privilege and, either

way, find that he has failed to carry his burden of proving lack of possession. At that point, assuming the Government has been able to make the minimum showing for enforcement of an IRS Summons required by *United States v. Powell*, 379 U.S. 48 (1964),[6] the District Court will order the Summons enforced. Should the taxpayer thereafter fail to produce the records or carry his burden of persuasion as to current inability to comply, the taxpayer will find himself cited for contempt and incarcerated or fined (or both) until the contempt is "purged."

Thus, if Gippetti is making a "testimonial" act of production by obtaining and producing the CNB records for the Government, under any conceivable scenario, his Fifth Amendment right not to be a witness against himself is meaningless because he must shoulder the burden of proving he does not possess or control the CNB records in order not to be compelled to produce them.

The Eleventh Circuit, faced with such a scenario in *In re Grand Jury Subpoena Dated April 9, 1996*, 87 F.3d 1198, 1204 (11th Cir. 1996), noted the impossible position such an interpretation placed the witness in:

> Thus, for the Court to treat appellant's statement [that she did not possess the

---

[6] To make out a *prima facie* case for enforcement of an IRS Summons, the Government need only show (1) the Summons was issued for a legitimate purpose contemplated by 26 U.S.C. § 7602 (an examination to determine the correctness of the taxpayer's filed return(s) is expressly listed as such a legitimate purpose), (2) the records sought "may be" relevant to that purpose (as judged by a much more liberal relevancy standard than required for the admission of evidence in a trial), (3) the records are not in the IRS' possession, and (4) all required administrative steps for the issuance of the Summons have been complied with.

> records sought in order to meet the burden of proving non-possession] as a waiver [of her Fifth Amendment privilege] would create an intolerable result, placing appellant in the position of remaining silent and being held in contempt for failing to produce the records she did not have, or saying she did not have the records and then being ordered to testify. *In other words, the appellant would have to choose between testifying and being held in contempt. Her Fifth Amendment right would have slipped between the cracks.* (emphasis added).

The Third Circuit's holding will inevitably yield a result contrary to the societal judgments underpinning the Founders' inclusion of a person's right not to "be compelled in any criminal case to be a witness against himself" in the language of the Fifth Amendment:

> Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for the accusatorial rather than the inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses, our sense of fair play . . . [and] our respect for the inviolability of the human personality and of the rights of each individual dictate this protection.

Couch v. United States, 409 U.S. 322, 328 (1973) (quoting *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964)).

In *Curcio*, this Court rejected the Government's contention that a union official who denied possessing

subpoenaed records had no Fifth Amendment right to refuse to testify about why he did not have them and who did. "The Fifth Amendment suggests no such exception." It guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Curcio*, 354 U.S. at 123. The Court found that while Curcio could be required to produce the union's books if they were in his possession, if he claimed lack of possession, "he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." *Curcio*, 354 U.S. at 124.

Like Curcio, Gippetti has denied possession of the specific CNB records (for 1999 and 2000) at issue here on the date the Summons was issued to him in February 2003. Gippetti's denial of possession was not seriously disputed by the Government. Given his position with the union, Curcio, like Gippetti, arguably could have been deemed in "control" of the non-produced records in that it is likely he knew who possessed them and/or where they were and potentially could have requested the possessor to turn them over if he was faced with being jailed for contempt. That testimony would undoubtedly have greatly aided the Government in its corruption investigation. This Court, however, held that requiring Curcio to do so was requiring him to be a witness against himself contrary to the Fifth Amendment. Requiring Gippetti to prove non-possession or face contempt clearly enhances the IRS' ability to obtain foreign based records but the issue is the same and the result should be no different. Nor does the Court's reformulation of the nature and scope of the privilege against self-incrimination since 1976 require a different result.

In *Fisher*, 425 U.S. at 410-411, *United States v. Doe*, 465 U.S. 605, 614 n. 13 (1984) ("*Doe I*"), and *Hubbell*, 530 U.S. at 43, the Supreme Court held that a witness'

act of producing records is "testimonial" unless *both the existence and the witness' possession* of subpoenaed records is established "with reasonable particularity" *by the Government* – not the witness.

These precedents make clear that a witness who denies possession, like Gippetti, is entitled by virtue of the Fifth Amendment privilege against self-incrimination, to stand on that denial. Compelling him to bear the burden of proving his claim would require him to waive the privilege in order to effectively assert it or face contempt. *Cf. Maggio v. Zeitz*, 333 U.S. 56, 66 (1948) (requiring a debtor to disprove his possession of property belonging to the bankrupt's estate in order to avoid contempt would be unjust and unrealistic).

Consistent with *Hubbell* and *Doe II*, the Courts of Appeal in the Eighth and the Ninth Circuits have also held that the Government – not the witness – bears the burden of proving the witness' possession and/or control in an enforcement proceeding. *United States v. Rue*, 819 F.2d 1488, 1493 (8th Cir. 1987); *In re Grand Jury Proceedings*, 41 F.3d 377 (8th Cir. 1994); and *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004); *see also In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993).

By placing the burden of disproving possession or control on Gippetti in order to avoid enforcement of the Summons (and ultimately contempt for failure to comply) the Third Circuit has effectively relieved the Government of any obligation to show pre-existing knowledge of Gippetti's possession of the records sought, one of the elements of establishing that Gippetti's "act of production" was not testimony, but only surrender. The Third Circuit cited no authority for this proposition, which is contrary to this Court's decisions and to the applicable law on this issue in four other circuits.

CONCLUSION

For the foregoing reasons, Jerome Gippetti respectfully requests that his Petition for Certiorari be granted.

Respectfully submitted,

Sills Cummis Epstein & Gross P.C.
Attorneys for Petitioner,
Jerome Gippetti

By: /s/Lawrence S. Horn
LAWRENCE S. HORN

Dated: March 22, 2006

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4122

UNITED STATED OF AMERICA,

v.

JEROME GIPPETTI,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civil 04-cv-00522
District Judge: The Honorable Katharine S. Hayden

Argued: September 13, 2005

Before: SLOVITER, BARRY, and SMITH, Circuit Judges

(Opinion Filed: November 8, 2005)

{Entered November 8, 2005}

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OPINION

BARRY, Circuit Judge

A civil investigation was commenced by the Internal Revenue Service ("IRS") into the 1999 and 2000 federal income tax liabilities of appellant Jerome Gippetti and his late wife. On February 6, 2003, the IRS issued a summons demanding that Mr. Gippetti appear before an IRS agent to provide testimony and produce records pertaining to his bank and credit card accounts with the Cayman National Bank, Ltd ("CNB"). After Gippetti

failed to comply, the IRS initiated this action to enforce the summons.[1]

Gippetti had reported interest income from the CNB account on the 1999 and 2000 federal income tax returns, and had disclosed the existence of the account on forms entitled "Reports of Foreign Bank and Financial Accounts" filed with the IRS. The IRS became aware of Gippetti's two CNB credit card accounts as a result of its Offshore Credit Card Project.[2] While Gippetti did not dispute the existence of these accounts, he denied that he possessed or had control over the records sought by the IRS. Moreover, in a somewhat inconsistent argument, Gippetti argued that any compelled production by him (of records he claimed he could not, in any event, produce) would constitute a testimonial "act of production" which would infringe upon his Fifth Amendment rights.

The District Court heard argument on April 19, 2004, and, on August 2, 2004, issued an order requiring

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[1] Among other things, the summons required him to produce, for the years 1999 and 2000, account applications, loan applications, monthly or periodic bank statements, passbooks, and cancelled checks for the CNB account, as well as the card application, monthly or periodic charge statements, charge receipts, and cash advance confirmations for, but not limited to, a CNB issued Master Card. Initially, the IRS was aware of only one CNB Master Card, but later discovered a second CNB Master Card.

[2] See Internal Revenue Service, http:/www.irs.gov/privacy/article/0.,id=131233,00. html (last visited Sept. 19, 2005). "OCCP is an initiative aimed at bringing back into compliance with U.S. tax laws participants who used 'offshore' payment cards or other offshore financial arrangements to mask or shelter their income. The IRS used judicial John Doe summonses to request information from three credit card companies (VISA, MasterCard, and American Express) regarding individuals who may have participated in offshore credit card scams. The IRS also summoned information from a Florida credit card processor, Credomatic, that services banks located in Caribbean tax haven countries. The goal is to identify US persons from offshore card transactions. A vendor queries the data and compares it against Name Search Facility (NSF) and Information Return Master File (IRMF) data. If a Taxpayer Identification Number (TIN) is found, the data is sent in an Excel spreadsheet through encrypted email to the Philadelphia campus, OCCP Unit. The spreadsheet is printed out and used by OCCP Unit personnel."

Gippetti to "produce the documents relating to those bank and credit card accounts at the [CNB] that the parties do not dispute are [Gippetti]'s accounts." App. 2. The Court ordered that Gippetti make this production "by whatever means." *Id.* It further noted, in a somewhat cryptic remark, that " is no issue for the Court to resolve regarding petitioner's Fifth Amendment rights" App. 3. On August 6, 2004, the Court issued a detailed final order.[3] This appeal followed.[4]

Subsequent to the issuance of the District Court's final order, Gippetti voluntarily executed and sent to CNB a written "consent directive" in which he requested copies of the CNB records the government was seeking; there is no suggestion that the consent directive was compelled. In his letter of August 16, 2004, Gippetti stated that he was making the request in order to comply with the August 2,2004 order of the District Court that he produce those records. He added that he "currently" did not have any of the records in his possession and did not have them in his possession any time since the summons was served on him. App. 204. By letter dated August 27, 2004, CNB refused Gippetti's request on the ground that a "'consent' under pain of penal sanction(s) does not constitute consent within the meaning of" Cayman Islands law. App. 205-06.[5]

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[3] For reasons that are unclear, the August 6 order was not entered onto the docket until August 27.

[4] Although the District Court also denied certain relief requested by the government, the government has not cross-appealed.

[5] This response was apparently anticipated by the government, and likely by Gippetti as well. During the April 19 argument, the government noted that "we do not want a consent directive . . . The bank is under no compulsion to respond. We don't want it because the bank – because we don't have any jurisdiction over the offshore bank." App. 30.

DISCUSSION

Gippetti calls this an "act of production" case, but says he does not have the records the government wants him to produce and has no control over getting them from CNB, as evidenced most recently by CNB's rejection of the consent directive he submitted to it. Parenthetically, he does not dispute, nor could he reasonably do so, that banks, including CNB, generate and, indeed, send to their customers monthly statements and the like and does not argue that, in 1999 and 2000, he did not, in fact, receive those statements and some or all of the other records sought by the government.

Gippetti raised the defense of lack of possession and/or control in the enforcement proceeding. *See United States v. Rylander*, 460 U.S. 752, 757 (1983) (" proceeding to enforce an IRS summons is an adversary proceeding in which the defendant may contest the summons 'on any appropriate ground.' [L]ack of possession or control of the records is surely such a ground .....") (citations omitted). The District Court, however, did not explicitly decide the issue, although its final order necessarily contained an implied finding that any defense of lack of possession or control had not been sustained.

More, however, was required. Given the enforcement order, a civil contempt action can and probably will ensue if Gippetti does not produce the records he was ordered to produce. He cannot, however, in a contempt proceeding, litigate or relitigate the issue of whether he possessed or had control over the relevant records at the time of the order to produce. *Rylander*, 460 U.S. at 456-57. As the Court of Appeals for the Second Circuit explained,

> Issuance of an enforcement order constitutes an adjudication that the respondent possesses and is able to produce

> the summoned documents at the time the order is issued, Thereafter, the respondent must produce the documents or face contempt proceedings in which he is foreclosed from claiming nonpossession at the time of the enforcement order. . . Because of its potentially drastic consequences, however, an enforcement order in a contested proceeding should not rest on a determination of possession that is merely implicit. Before ordering production on penalty of contempt, the district court should expressly determine that the respondent possesses the summoned documents.

United States v. Barth, 745 F.2d 184, 187 (2d Cir. 1984) (citation omitted). Finding that the issue of possession is complex and fact-sensitive, the Court vacated the relevant portion of the enforcement order and remanded the proceeding to enable the District Court to rule explicitly on the defense of nonpossession.

We, too, believe that an express determination of possession or control is required. If the District Court determines that Gippetti does not possess or have control over the records the government is seeking – and it is Gippetti's burden – enforcement should be denied. If, however, the Court determines that he does possess or have control over those records, failure to produce the records will be on pain of contempt.

In anticipation, however, of a renewed "act of production" defense if, on remand, production is ordered, we offer the following observations. There can be no question – and Gippetti does not seriously dispute – that most or all of the CNB records at issue here exist, that the government knows they exist, and that they are located at CNB. Indeed, Gippetti has acknowledged that

he maintains the specific bank account at issue and the credit cards tied to that account, as evidenced by his reported interest income, forms he filed with the IRS, and the consent directive he voluntarily signed. He also concedes that the consent directive was non-testimonial because it asked CNB, not him, "to locate, retrieve and collect" the relevant records. (App. Br at 26). He argued, however, that because CNB refused his request and the government cannot obtain the records through independent sources, requiring him "to locate, retrieve and collect" them *would* be testimonial because he would be required to do the IRS's "leg-work and thinking." App. Reply Br. at 23.

It has long been established that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976). This case is much like *Fisher*, in which the Court rejected the taxpayer's claim that working papers prepared by the taxpayer's accountant that the IRS knew were in the possession of the taxpayer's attorney were protected by the Fifth Amendment.

> The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client . . . The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.

425 U.S. at 411.

So, too, here, it will involve no thinking by Gippetti or reveal any contents of his mind to simply turn over to the government whatever records CNB were to give to him, and mere turnover will surely not authenticate them. *See Doe v. United States*, 487 U.S. 201, 218 (1988) ("[T]he only factual statement made by anyone will be the *bank's* implicit declaration, by its act of production . . ., that *it* believes the accounts to be petitioner's") (emphasis in original)); *see also Fisher*, 425 U.S. at 413 (" would express nothing more than the taxpayer's belief that the papers are those described in the subpoena . . . The taxpayer would [not be] competent to authenticate the accountant's work papers or reports . . . The taxpayer did not prepare the papers and could not vouch for their accuracy").[6] Stated somewhat differently, for Gippetti to produce the CNB records would have no testimonial significance, and any Fifth Amendment claim would be without merit.[7]

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[6] Whether the government can otherwise authenticate the records has no bearing on whether Gippetti has a valid Fifth Amendment claim.

[7] Given this conclusion, we need not reach the issue of whether Gippetti waived any Fifth Amendment claim as to the CNB records.

CONCLUSION

That part of the order of the District Court entered on August 27, 2004 enforcing the summons will be vacated and this matter remanded for further proceedings consistent with this Opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	
	:	
Petitioner,	:	
	:	
		Civil No. 04522(KSH)
vs.	:	
	:	
JEROME GIPPETTI,	:	
	:	
Respondent.	:	

ORDER

{Entered August 6, 2004}

AND NOW, this //6th// day of //August//, 2004, after consideration of the United States' petition to enforce an Internal Revenue Summons issued on February 6, 2003, to Jerome Gippetti, with the declarations in support thereof, and after considering respondent's opposition thereto, including respondent's letter application to quash the summons and a Fed.R.Civ.P. 45 hearing subpoena, and the Government having cross-applied for enforcement of the subpoena; after having held a hearing thereon on April 19, 2004, and for the reasons set forth on the record and in accordance with the Court's August 2, 2004 Opinion and Order, it is:

ORDERED:

1. The Respondent shall appear before an Internal Revenue Service agent at a time and place on a date certain agreed upon by counsel within thirty //45// (~~30~~) days of the entry of this Order and produce to the Internal Revenue Service the documents relating to those

bank and credit card accounts at the Cayman National Bank that the parties do not dispute are respondent's accounts. That is,

a. Each and every record identified in the February 6, 2003 summons (Paragraph No. 1 and subparts thereto) that pertains to the bank account that GIPPETTI and/or his deceased spouse maintained in 1999 and 2000 at Cayman National Bank ("CNB"), Account No. 025-XXX-XXX-XXX-4001;[8]

b. Each and every record identified tithe February 6, 2003 summons (paragraph No. 1 and subparts thereto) that pertains to the MasterCard Credit Cards that GIPPETTI and/or his deceased spouse had or maintained in 1999 and 2000 through CNB, Account Nos. 5425-XXXX-XXXX-0132 and 5425-XXXX-XXXX-0017.

2. Respondent GIPPETTI shall further respond to the summons and himself produce, on the agreed upon date, those records that were previously shown to an IRS Agent, but copies of which were never produced. These documents are identified on (Government) Exhibit 30 which lists those documents that were shown to IRS Revenue Agent Remington by GIPPETTI'S accountant but not given to the agent.

3. With respect to production of the balance of the records sought by the February 6, 2003 summons (the "undifferentiated unidentified documents"), because Petitioner did not specifically identify certain documents by account number or specify them as having been

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[8] All account numbers set forth in this Order are redacted in part to protect the privacy of Respondent. The account numbers of Respondent's Cayman National Bank account and the two MasterCard credit cards were read into the record on April 19, 2004, by Petitioner's counsel, and the record has been transcribed. See also Government Exhibits 7 and 88 (identifying Respondent's CNB account number) which were admitted into evidence. (4/19/03 Tr. at 20, 38.)

previously reviewed by an IRS agent, Petitioner's request to enforce this portion of the summons as to the undifferentiated unidentified documents is denied without prejudice.

4. With respect to the Government's subpoena served on GIPPETTI, Respondent GIPPETTI himself must produce all credit card and account agreement(s) with the Cayman National Bank, and the related credit card(s), and all correspondence with that bank relating only to the specific accounts referred to in Paragraph 1 of this Order;

5. Petitioner's request to enforce the subpoena insofar as it relates to frequent flyer and hotel guest statements and passport is denied without prejudice.

/s/ Katharine S. Hayden
KATHARINE S. HAYDEN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 04-4122

UNITED STATES OF AMERICA

v.

JEROME GIPPETTI
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civil 04-cv-00522
District Judge: The Honorable Katharine S. Hayden

Present: SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, SMITH, FISHER, and VAN ANTWERPEN, Circuit Judges

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SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

{Entered January 4, 2006}

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: January 4, 2006
DMM/cc: Steven R. Rowland, Esq.
Richard J. Sapinski, Esq.
Frank P. Cihlar, Esq.
Randolph L. Hutter, Esq.
Gilbert S. Rothenberg, Esq.
Paula K. Speck, Esq.

(2)

Supreme Court, U.S.
FILED
MAY 24 2006
OFFICE OF THE CLERK

No. 05-1231

In the Supreme Court of the United States

JEROME GIPPETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Fifth Amendment privilege against self-incrimination is not violated by requiring a taxpayer, in responding to an IRS summons seeking production of records pertaining to offshore accounts, to bear the burden of producing evidence in support of his claim that the records pertaining to those accounts are not in his possession or control.

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In the Supreme Court of the United States

No. 05-1231

JEROME GIPPETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in an official reporter, but it is available at 153 Fed. Appx. 865. The order of the district court (Pet. App. 10a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2005. A petition for rehearing was denied on January 4, 2006 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on March 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Service (IRS) began an investigation into petitioner's 1999 and 2000 federal income tax

liabilities based on information gathered in its Offshore Credit Card Project—an ongoing effort to identify persons who conceal taxable income by transferring funds to offshore jurisdictions and use credit or debit cards to access the funds in the United States. C.A. App. 63 ¶ 11. On February 6, 2003, the IRS issued a summons to petitioner directing him to appear and give testimony and to produce for examination records described in the summons. Pet. App. 2a; see 26 U.S.C. 7602. Among the records requested were those pertaining to a Cayman Islands bank account that petitioner maintained at the Cayman National Bank (CNB) and two CNB Master Card credit cards that had been issued to him. Pet. App. 2a, 3a n.1. Petitioner had reported interest from the bank account on his 1999 and 2000 individual federal income tax returns and had disclosed its existence in "Reports of Foreign Bank and Financial Accounts" that he had filed with the IRS. *Id.* at 3a. The IRS had independently determined the existence of the two credit card accounts in the course of its Offshore Credit Card Project. *Ibid.* Petitioner failed to comply with the summons. *Id.* at 2a-3a.

2. The United States petitioned the United States District Court for the District of New Jersey to enforce the summons pursuant to 26 U.S.C. 7604. Petitioner conceded that the government had established a prima facie case for enforcement under *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964) (the government "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed"). C.A. App. 78, 87, 117. He submitted an affidavit, however, claiming that he did not possess any of the records sought by the IRS relating to the

CNB accounts, although he did not deny that he could obtain them. *Id.* at 150 ¶ 9.[1] In contrast, with respect to "all other items" sought by the summons, petitioner "decline[d] to state whether there are any such documents within my possession, custody or control," *id.* at 150-153 ¶¶ 9-18, and further "decline[d] to produce them on the ground that my act of producing those documents may tend to incriminate me," *ibid.* Petitioner elaborated that requiring him to produce records "that the government does not independently know exist" or "know * * * are in my possession, custody and control" would "tend to incriminate" him. *Id.* at 153-154 ¶ 20 (citing *United States* v. *Hubbell*, 530 U.S. 27, 45-46 (2000)). Following a hearing, the district court ordered petitioner to produce to the IRS "by whatever means," "the documents relating to those bank and credit card accounts at the [CNB] that the parties do not dispute are [petitioner's] accounts." Pet. App. 3a-4a.[2]

After the district court issued its final order, petitioner "voluntarily executed and sent to CNB a written 'consent directive' in which he requested copies of the CNB records

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[1] In a March 25, 2004, letter to the district court, petitioner's counsel asserted that petitioner "does not have possession, custody or control of the foreign account records sought," C.A. App. 78, but that assertion did not comply with the district court's order to show cause, see *id.* at 72 (court will consider only those issues "supported by affidavit(s)").

[2] The district court denied without prejudice the government's petition to enforce the summons with respect to "the balance of the records sought"—that is, records other than those pertaining to the identified CNB accounts and those previously shown to the IRS. C.A. App. 3. Contrary to petitioner's assertion (Pet. 4), the district court did not find that petitioner had "established a legitimate basis for asserting his Fifth Amendment privilege against self-incrimination" with respect to the CNB records at issue. In fact, the court expressly found that its resolution of the matter left the court with "no issue * * * to resolve regarding petitioner's Fifth Amendment rights." C.A. App. 8.

the government was seeking."[3] Pet. App. 4a. Petitioner made clear in his letter that he was being forced by the court to make the request. C.A. App. 204. CNB refused petitioner's request on the ground that a "'consent' given under pain of penal sanction(s) does not constitute consent within the meaning of the [Cayman Islands Confidential Relationships] Law." *Id.* at 205.

3. The court of appeals in an unpublished opinion vacated that part of the district court's order enforcing the summons and remanded the case for further proceedings. Pet. App. 1a-9a. The court of appeals concluded that the enforcement order could not be upheld in the absence of an express finding that petitioner possessed or controlled the records that the district court had ordered him to produce. *Id.* at 5a. The court of appeals explained that such a finding was required because of the "drastic consequences" that may attend failure to comply with an order enforcing a summons. *Id.* at 6a (quoting *United States* v. *Barth*, 745 F.2d 184, 187 (2d Cir. 1984), cert. denied, 470 U.S. 1004 (1985)). In instructing the district court to address the possession and control issue, the court of appeals stated that "it is [petitioner's] burden" to establish that "[he] does not possess or have control over the records the government is seeking." *Ibid.* If petitioner meets his burden, the court observed, "enforcement should be denied." *Ibid.*

The court of appeals went on to offer additional "observations," Pet. App. 6a, "[i]n anticipation * * * of a renewed

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[3] The district court entered an opinion and order on August 2, 2004, directing petitioner to produce the CNB records. C.A. App. 6-8. On August 6, 2004, the district court issued a final order enforcing its August 2, 2004 opinion and order. *Id.* at 2-4. Because petitioner sent his consent directive to CNB on August 16, 2004, after the district court had issued its final order, the directive itself was not part of the record that had been considered by the district court. *Id.* at 204.

'act of production' defense if, on remand, production is ordered," *ibid.* The court observed that petitioner had not seriously disputed "that most or all of the CNB records at issue here exist, that the government knows they exist, and that they are located at CNB." *Ibid.* The court further noted that petitioner had "concede[d]" that the consent directive he had sent to CNB requesting the documents in question "was non-testimonial because it asked CNB, not him, 'to locate, retrieve and collect' the relevant records." *Id.* at 7a (citation omitted). The court accordingly concluded that the instant case was similar to *Fisher* v. *United States*, 425 U.S. 391 (1976), in that "[t]he existence and location of the papers [sought by the IRS] are a foregone conclusion and [petitioner] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." Pet. App. 7a (quoting *Fisher*, 425 U.S. at 411). The court of appeals thus observed that "for [petitioner] to produce the CNB records would have no testimonial significance, and any Fifth Amendment claim would be without merit." *Ibid.* (footnote omitted).[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the court of appeals' decision is interlocutory. Pet. App. 5a-6a. Further review is not warranted.

1. The court of appeals vacated that part of the district court's order that enforced the IRS's summons and re-

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[4] The court of appeals declined to address the government's contention that petitioner had waived any Fifth Amendment claim with respect to the CNB records that the district court had ordered him to produce. Pet. App. 8a n.7; see pp. 2-3, *supra* (citing C.A. App. 150-154); Gov't C.A. Br. 19-22.

manded the case to permit the district court to make an express determination whether petitioner possesses or controls the CNB records that the district court had previously ordered petitioner to produce. Pet. App. 9a. The interlocutory posture of this case "of itself alone furnishe[s] sufficient ground" for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). If the district court finds in petitioner's favor, then the summons will not be enforced, Pet. App. 6a, and the issues raised by the initial appeal will be moot. Conversely, if the district court enters a finding adverse to petitioner and orders enforcement of the summons, petitioner can re-assert his current claims together with any objections to the proceedings on remand in a subsequent appeal and, in the event of an adverse final appellate judgment, in a petition for a writ of certiorari.[3]

2. Petitioner contends (Pet. 14-19) that the court of appeals erred in placing the burden on him to show that he lacks possession and control of the CNB records sought by the IRS summons, after the government established its case for enforcement under *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964), because doing so violates his Fifth Amendment privilege against compelled self-incrimination. Petitioner's argument is without merit.

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[3] For similar reasons, this Court ordinarily denies petitions by criminal defendants challenging interlocutory decisions. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-259 n.59 (8th ed. 2002).